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No. 98-542

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In The

Supreme Court of the United States

October Term, 1998

DARREL D. SMITH,

Petitioner,

vs.

JOHN PETER LEE, LTD., TOM GRIMMETT,
Chapter 7 Trustee,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT JOHN PETER LEE, LTD.

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STATEMENT PURSUANT TO RULE 29.6

Respondent, John Peter Lee Ltd., has no parent companies and no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

Respondent John Peter Lee, Ltd. objects to Smith's misrepresentation of the relevant facts outlined herein. Petitioner, Darrel D. Smith, filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in 1991. On January 11, 1994, the United States Bankruptcy Court, District of Nevada, entered an order confirming Smith's Third Plan of Reorganization ("Plan").

The Plan provided for two alternative means of funding the claims against the Plan. The first means of funding the Plan was a litigation claim by Smith, which he estimated to be "conservatively worth at least $9,000,000". Page 2a, *infra*.

The second alternative means of funding payment of the claims under the Plan was

> by making reproductions and prints of Maxfield Parrish's painting *Daybreak*, which [Smith] owns, with all profits after payment of production costs and debtor's living expenses to fund the Plan.

Page 2a. If neither of the first two alternative sources of funding were adequate within a specific time, Smith could only fund the Plan by selling *Daybreak*.

A. Smith Defaulted Under His Reorganization Plan.

Smith's two alternative sources of funding the Plan failed. First, Smith's litigation yielded only a judgment of $80,000, far short of the amount required to fund the Plan, which required in excess of $1,000,000. Second, the debtor gave up on any ostensible efforts to sell prints of *Daybreak* because such sales were not likely to ever return a net profit after expenses. Further, Smith then became unwilling to sell *Daybreak* to fund the Plan.

B. The Bankruptcy Court Converted The Case Under The Plan Provisions And Under The Conversion Statute.

Smith's Plan specifically authorized the court to convert his case if he defaulted on the Plan by providing at Section (e)(2) of the Plan under the Section entitled, "Conditions":

> (2) that if the Debtor defaults in any terms of the Plan, the court upon hearing after notice to Debtor, the creditors and such other persons as the court may direct, may enter an order either adjudging the Debtor bankrupt or directing the bankruptcy be proceeded with pursuant to the provisions of the Bankruptcy Code, as amended, or dismissing the proceedings, whichever in the opinion of the court may be in the best interest of creditors, and the amounts of all claims shall be reinstated in their allowed amount, crediting only payments received thereon.

Page 3a. When Smith defaulted, this conversion provision of his Plan became effective.

The bankruptcy court converted Smith's Chapter 11 case to Chapter 7 pursuant to 11 U.S.C. § 1112(b) on February 6, 1996. On February 16, 1996, the bankruptcy court ordered the sale of *Daybreak* at public auction. The bankruptcy court provided for appropriate commission and sales arrangements by the Chapter 7 Trustee and set a $1.5 million reserve for the payment of creditors' claims.

The bankruptcy court ordered the conversion and subsequent sale of *Daybreak* because of Smith's failure to implement his Plan. Although Smith had no other alternative means of funding the Plan, he wanted to wait to sell the painting

and argued that his creditors must wait for payment. He took the position that the Plan imposed no good faith obligation of diligence upon him and that he was free to indefinitely delay the sale of the painting.

The bankruptcy court correctly recognized that Smith failed to fund the Plan through his first two alternatives and that the sale of the painting was the only remaining alternative. The bankruptcy court also correctly recognized that the timing was right to maximize the sale price of the painting.

C. Smith Has Now Accepted The Benefits Of The Conversion Order.

The painting sold at auction for $3.9 million, net of buyer's premium and applicable city and state taxes. Although Smith has vigorously argued against the bankruptcy court's legal grounds for ordering the sale, Smith has gladly accepted the benefits of the successful sale, which far exceeded expectations.

Smith has since received the court's permission to spend from estate assets hundreds of thousands of dollars of sale proceeds to purchase another Parrish painting and to fund his multiple fronts of litigation. Smith has accepted the benefits of the sale on the premise that a surplus exists.

Smith could not pay the purchaser back if the conversion were reversed because Smith has already spent the money. He never appealed the order allowing the sale to occur. According to the bankruptcy trustee as of October 26, 1998, only $317,000 remains in the estate. All parties have relied upon the finality of the sale. Essentially, Smith argues a set of legal niceties of dubious merit, but Smith does not have any legal basis to overturn the sale. The only practical issue is how to distribute the proceeds.

Smith argues that he should control the distribution instead of a trustee, claiming the painting never became an asset of the Chapter 7 estate. Smith ignores the plain language of his Plan plus the fact that he would now still have to pay the creditors the same amount for their claims and the Chapter 7 Trustee the same amount for his court-ordered services as a collections and disbursements agent of the $3.9 million proceeds.

In short, Smith argues no damage caused him by the sale which has benefitted him tremendously, because he will receive the surplus once all creditors are paid. Smith shows the wisdom of the bankruptcy court's prohibition against his handling the sale proceeds because Smith seeks only to control the funds for his benefit without regard to the rights of creditors whose rights to the sale proceeds have legal priority over his own.

On Smith's appeal of the bankruptcy court's conversion order, the United States District Court, District of Nevada, affirmed the conversion on the grounds of 11 U.S.C. § 1112(b)(7), (8) and (9). *In re: Smith*, 201 B.R. 267 (D. Nev. 1996). On March 20, 1998, the United States Court of Appeals for the Ninth Circuit affirmed the district court in an unpublished memorandum decision.

Smith claims $300,000 of negative tax consequences from the Trustee's handling of the sale proceeds, but Smith has not provided proof or explanation for his claim. Smith also implies some type of harm resulting to him from the Trustee's holding of the asset, but Smith alleges no mismanagement of the asset. The legal fees incurred result from Smith's own decision to litigate his bankruptcy continuously for two years after he and all other parties have changed positions in reliance upon the validity of the sale of *Daybreak* by the Chapter 7 Trustee. This is the eighth appeal Smith has filed against John Peter Lee, Ltd. He has also appealed other decisions of the bankruptcy court in addition.

Smith has accepted the benefits of the Order from which he is appealing. Without that Order, the Trustee could not have sold *Daybreak* or received the $3.9 million sale proceeds. Smith has accepted more than $200,000 of the sale proceeds to pay his present counsel's fees. Smith has also obtained court authorization for the purchase of another Maxfield Parrish painting for some $235,000.

REASONS FOR DENYING THE WRIT

I.

THE LOWER COURTS CORRECTLY CONVERTED SMITH'S CASE BASED UPON THE PLAIN MEANING OF THE STATUTE AND OF THE PLAN PROVISION APPLICABLE TO SMITH'S DEFAULT.

Smith failed to implement the Plan. First, his litigation failed. Then he failed to diligently pursue the reproduction and sales of *Daybreak* prints to fund the Plan even after given three attempts over eight months by the bankruptcy court. His actions constituted grounds for conversion.

11 U.S.C. § 1112(b) states in pertinent part as follows:

> . . . The court may convert a case [under Chapter 11] to a case under Chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including — * * *
>
> (7) Inability to effectuate substantial consummation of a confirmed plan;
>
> (8) Material default by the debtor with respect to a confirmed plan. . . .

These subsections justify the bankruptcy court's conversion of Smith's case. *In re: Smith*, 201 B.R. at 271.

When Smith obtained his $80,000 judgment, he failed under his first manner of funding the Plan through litigation. He has since lost an appeal of the $80,000 Judgment at the Supreme Court of Nevada. When Smith failed to diligently pursue the making and selling of reproductions and prints of *Daybreak*, Smith failed under the second manner of funding required by the Plan. These are the only means of funding and implementing the Plan which Smith provided. His failure in these respects is an "inability to effectuate substantial consummation of a confirmed Plan" within the meaning of 11 U.S.C. § 1112(b)(7).

Smith's failure to fund the Plan is likewise a "material default by the debtor with respect to a confirmed Plan" within the meaning of 11 U.S.C. § 1112(b)(8). Smith's failure to fund the Plan under his two alternative means specified in the Plan, is statutory grounds for conversion. The Plan provision quoted above in the Statement of the Case also provided specifically for conversion in the event of Smith's default. The Court of Appeals and the district court correctly affirmed the bankruptcy court's conversion of the case to Chapter 7.

Smith incorrectly argues through a convoluted series of cross-referencing between Bankruptcy Code sections that the bankruptcy court cannot convert a Chapter 11 case where a Plan has been confirmed. Smith's argument would make a nullity of 11 U.S.C. § 1112(b)(7) and (8). The statutes should be read according to their plain meaning and not in self contradiction to their express terms. *E.g.*, *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 109 S. Ct. 1026 (1989). The lower courts correctly ruled that Smith's actions created grounds for conversion and that 11 U.S.C. § 1112(b) authorized the conversion of Smith's Chapter 11 case.

II.

THE COURTS OF APPEALS ARE NOT IN CONFLICT WITH THE DECISION BELOW.

Smith cites no decision from any of the circuit courts of appeal rejecting, conflicting, attacking or even considering the reasoning of the Ninth Circuit Court of Appeals for affirming the conversion of Smith's case. None of the cases suggest conversion to be groundless here where the debtor is in default of the Plan, where the bankruptcy court approved the sale of the primary asset contemplated to fund the Plan and where the debtor has accepted the benefits of the sale.

Smith essentially argues that he had no good faith duty of diligence to fund his Plan but could delay payments of creditors with impunity under the maximum, contingent sixty (60) month payment provision of his Plan, regardless of the increasing accrual of risk of inability to pay creditors. The lower courts in this case each correctly interpreted the Plan to require Smith's good faith efforts to fund the Plan.

Smith's argument that statutory conversion does not exist flies in the face of logic and the plain meaning of 11 U.S.C. § 1112(b). Smith admits at page 27 of his Petition that numerous courts provide for the vesting of assets in the new Chapter 7 estate upon conversion and that reorganization plans can expressly provide for conversion. Notably, Smith does not suggest any purpose for the statute. If his theory were correct, conversion would be impossible in a case such as this, where the debtor defaults under his Plan.

As the district court below correctly stated concerning the bankruptcy court's power to convert this case:

> The bankruptcy court is given wide discretion to convert a Chapter 11 case to Chapter 7 for cause, and such a conversion is reviewed under an abuse of discretion standard. *Johnston v. Gem Development Co.*, (*In Re: Johnston*) 149 Bankr. 158, 160 (9th Cir. BAP Nev. 1992). Legislative history indicates that cause is broadly defined, allowing a court to "consider other factors as they arise, and to use its equitable powers to reach an appropriate result in individual cases." *H.R. Rep. No*, 595, 95th Cong., 1st Sess. 405, N.1 at 405-06 (1977).

In Re: Smith, 201 Bankr. at 270. Here the bankruptcy court reached the appropriate result and did not abuse its discretion in the exercise of its equitable powers by converting Smith's case following his default under the Plan.

The holdings of the circuit cases Smith cites do not support his position. The two circuit court of appeals cases Smith discusses, *Harstad v. First American Bank*, 39 F.3d 98 (8th Cir. 1994) and *In Re: Chattanooga Wholesale Antiques, Inc.*, 930 F.2d 458 (6th Cir. 1991), do not conflict with the Ninth Circuit Court of Appeals' decision below.

Harstad was not a conversion case. The Eighth Circuit Court of Appeals there ruled that the plan which did not there provide for retention of preferential transfer avoidance powers following confirmation did not allow the debtor to pursue any such avoidance actions. The instant case does not involve any avoidance powers but is a conversion case.

The one remote similarity between the instant case and the facts of *Harstad* is that both courts followed plan provisions concerning the allowance or disallowance of proposed means of funding the plan. In *Harstad*, the plan did not allow pursuit

of the avoidance powers. In the instant case, the plan did allow for sale of *Daybreak* when the other means of funding failed. Although the facts of *Harstad* are largely dissimilar to the instant case, the holding does not conflict with the Ninth Circuit Court of Appeals' ruling in this case.

Smith incorrectly argues the rulings below to conflict with the holding of *Chattanooga Wholesale Antiques, Inc., supra.* Smith makes his argument by referencing only part of the holding concerning the trustee's lack of power after conversion of the Chapter 11 case to avoid post-confirmation transfers. The rest of the court's holding directly contradicts Smith's assertion that the trustee has no power over the estate. After conversion, concerning a pre-confirmation, preferential transfer to a bank, the court stated:

> The bankruptcy court held that this payment was authorized under Section 549(a). The district court reversed this order and held that the trustee was entitled to recover the payment as an unauthorized transfer of estate property after commencement of the bankruptcy case. We agree with the district court.
>
> . . . No order of the court authorized this payment. . . . Likewise, no provision of the bankruptcy code authorized the payment. [A contrary holding] would clothe the debtor with power to treat unsecured creditors differently. Such a holding would run counter to one of the fundamental purposes of bankruptcy — equal treatment of unsecured creditors.

930 F.2d at 465. The court held that the trustee had avoidance power under 11 U.S.C. § 549 to recover the asset belonging to the converted Chapter 7 estate.

Like *Harstad, Chattanooga Wholesale Antiques, Inc.* focuses upon transfer avoidance powers, which is not an issue in the instant case. To the degree this Sixth Circuit case is comparable to the instant case, it is not in conflict because it recognizes the trustee's power over the estate following conversion.

The Sixth Circuit opinion also weighs the factor of prior court allowance of the action at issue. In the instant case, the bankruptcy court confirmed the Plan which gave the court continuing power over *Daybreak* and specifically contemplated the sale of *Daybreak* in the event the primary intended means of funding the Plan failed. Though the facts of *Chattanooga Wholesale Antiques, Inc.* are distinguishable, the allowance of the trustee's post-conversion avoidance powers over the estate is consistent with the rulings of the courts below in the instant case and is not in conflict with the Ninth Circuit Court of Appeals.

Smith does not discuss in detail the other circuit courts of appeals' opinions he cites. Instead, he uses partial explanations from dicta to overgeneralize from a complex series of loose analogies and poorly analyzed string citations of cases. The cases he cites, discussed below, have dissimilar fact patterns, procedural settings and legal issues from the present case.

Smith largely ignores the factual and procedural differences among the cases he cites. One of Smith's cited cases, *Bank of Louisiana v. Pavlovich*, (*In Re: Pavlovich*), 952 F.2d 114, 116 (5th Cir. 1992), explains the nature of Smith's problem of overgeneralizing broad bankruptcy law principles from dissimilar cases as follows:

> With some trepidation, we venture into analysis of the impact of a confirmed plan of reorganization

> upon a subsequent conversion to Chapter 7. In each such case, much depends on procedural nuances.

Pavlovich involved the issue of discharge and did not focus upon the standard of conversion, which Smith argues to have been improperly applied in the instant case. Thus, although Smith cites this Fifth Circuit Court of Appeals' case, it is largely unhelpful by its own terms in resolving the instant case and its far different procedural issues.

The same is largely true of the cases Smith cites. For example, many of Smith's cases provide no helpful analysis of the law of conversion of bankruptcy cases. E.g., *In Re: Continental Airlines*, 91 F.3d 553 (3rd Cir. 1996); *DeLaurentiis Entertainment Group, Inc.*, 963 F.2d 1269 (9th Cir. 1992), *cert. den.*, 505 U.S. 918 (1992); *Department of Air Force v. Carolina Parachute Corp.*, 907 F.2d 1469 (4th Cir. 1990); *Hillis Motors, Inc. v. Hawaii Automobile Dealers Assoc.*, (*In Re: Hillis Motors, Inc.*), 997 F.2d 581 (9th Cir. 1993); *In Re: Orange Tree Associates*, 961 F.2d 1445 (9th Cir. 1992); *In Re: Penrod*, 50 F.3d 459 (7th Cir. 1995); *Riverside Nursing Home v. Northern Metropolitan Residential Health Care Facility, Inc.*, 977 F.2d 78 (2nd Cir. 1992). Smith cited all of these cases in his effort to argue a conflict to exist among the circuits concerning his red herring theories of vesting at confirmation, but conversion is not at issue in these cases. They are inapplicable.

Of the other circuit court of appeals cases Smith cites, *Goodman v. Phillip R. Curtis Enterprises*, 809 F.2d 228 (4th Cir. 1987) focuses upon plan modification and implementation rather than conversion. In *Laing v. A.G. Johnson* (*In Re: Laing*), 31 F.3d 1050 (10th Cir. 1994), the court focused upon dischargeability in a converted case where prior to conversion the debtor had waived all defenses concerning dischargeability. These cases are inapplicable and do not conflict with the Ninth Circuit Court of Appeals' ruling below.

Paul v. Monts, 906 F.2d 1468 (10th Cir. 1990), another of Smith's cases, is highly consistent with the ruling below in this case. In *Paul*, the trustee liquidated the assets following conversion, as occurred in the instant case. The court acknowledged the non-exclusive nature of remedies available to creditors where a debtor such as Smith defaults under his Plan, consistent with the ruling below of the instant case.

The correctness of the conversion was not at issue in the converted Chapter 13 case of *Security Bank v. Neiman*, 1 F.3d 687 (8th Cir. 1993). The court joined "the line of cases holding the estate continues to exist after confirmation of the Chapter 13 plan." 1 F.3d at 690. Like the other cases Smith cites, the facts are dissimilar, but comparison to the instant case tends to support the reasoning of the courts below in this case and not at all to conflict with the Ninth Circuit Court of Appeals' ruling.

Finally, the last court of appeals case listed in Smith's Table of Authorities, *Vogel v. Russell Transfer, Inc.*, 852 F.2d 797 (4th Cir. 1988), recognized the trustee's avoidance powers after conversion but restricted the powers from reaching transfers specifically authorized by the court. In passing, the court rejected the same argument Smith makes, that no estate remains after conversion, describing the argument as "odd" as follows:

> The trustee makes an odd argument concerning Section 549 [the trustee's avoidance power]. He argues that it does not apply because following confirmation of the Chapter 11 plan, there is no estate so that the transfer of the security interests [sought to be avoided], as dated by the perfection, was not property "of the estate." . . . The inapplicability of Section 549 does not help the trustee; it means that the trustee must look for another source for his claimed power.

852 F.2d at 800-01. *Vogel* does not adopt Smith's argument but notes that it is "odd".

No conflict exists among the circuit courts of appeals concerning the reasoning of the Ninth Circuit Court of Appeals and the courts below. Smith misstates the law of each of these circuit courts of appeals by trying to create a conflict among the circuits where none exists. The reasons for granting a petition for writ of certiorari are absent under Supreme Court Rule 10.

III.

SMITH MISREPRESENTS THE IMPORTANCE OF THE ISSUES HE IDENTIFIES.

This Court need not micro-manage alleged splits of authority among lower courts not yet analyzed by the circuit courts of appeals. Smith's citation of lower court decisions contains similar problems as his citations to the circuit courts of appeals. The cases do not address the factual, procedural and substantive legal issues present in this case. As he did below, Smith relies heavily upon *T.S.P. Industries*, 117 B.R. 375 (Bankr. N.D. Ill. 1990), for his contention that conversion was improper in the instant case.

T.S.P. Industries is a bankruptcy court case. It does not provide a detailed specification of the Chapter 11 plan at issue in that confirmation case. The *T.S.P. Industries* court acknowledged broad discretion in the bankruptcy court to a converted Chapter 11 case following plan confirmation. The court also acknowledged that after conversion of a Chapter 11 case, the Chapter 7 trustee holds avoidance powers over preferential or fraudulent conveyances. As the district court below in this case stated as to *T.S.P.*:

> The [*T.S.P. Industries*] court gave no explanation as to why Section 541 did not vest the [avoidance powers for preferential or fraudulent conveyances] in the debtor in such a situation. The court also failed to explain why an estate survived confirmation of a plan *only* when fraud occurred before the estate was created and no significant assets existed at the time of conversion. . . . The court provided no legal precedent or Congressional support for allowing specific language in an individual plan to override Section 541, which vests the property in the debtor upon confirmation of a plan.
>
> The *T.S.P.* court's analysis would virtually eliminate the power of courts to convert confirmed plans, a power which is expressly granted in Section 1112(b)(7-9), and it would grant courts the power to nullify the revesting of the estate in the debtor under Section 541 by explicitly retaining jurisdiction over a particular plan. This Court will not change the statutory power of a court to convert under Section 1112(b)(7-9) in such a drastic manner without a finding of Congressional intent.

Smith, 201 Bankr. at 273-74. Like the problem described in *Pavlovich*, *supra*, the *T.S.P. Industries* opinion is difficult to apply to other cases because the opinion does not include a specific description of the plan of reorganization and its factual setting. The district court below in this case correctly rejected the application of *T.S.P. Industries* to the facts of the instant case.

Smith lists a number of lower court cases in his footnote 13 in conjunction with his argument concerning *T.S.P.* These cases acknowledge the existence of a Chapter 7 estate upon conversion. The cases contradict Smith's theory that a Chapter

7 trustee allegedly has no estate to administer after a conversion of a Chapter 11 case where a plan is confirmed.

Smith misrepresents that the conversion is allegedly likely to consume resources which otherwise would benefit creditors. In this case, the only expenses involve Smith's litigation about a theory which does not apply in this case. Creditors do not benefit from Smith's litigation because this is a surplus case. The court has approved the sale of *Daybreak*, and Smith has sought and obtained court approval to pay creditors. Smith's contentions concerning alternative legal theories would not change the ultimate result. The sale is now final, and full payment of the funds must proceed.

IV.

SMITH SHOWS HIS OWN ARGUMENTS TO BE INSUBSTANTIAL BY CONCEDING THAT ALTERNATIVE AUTHORITY, 11 U.S.C. § 1142, ALLOWS THE SAME RESULT AS THE BANKRUPTCY COURT REACHED BELOW.

Smith cites no circuit court of appeals authority for his proposition that the Ninth Circuit Court of Appeals erred as to the necessity of the specific plan language to override the vesting provisions of 11 U.S.C. § 1141. Instead, Smith argues that the alternative basis for relief available under 11 U.S.C. § 1142 allegedly negates the statutory authority of the conversion statute of 11 U.S.C. § 1112(b). 11 U.S.C. § 1142 states:

> **Implementation of plan**
>
> (a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity

> organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.
>
> (b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

The fact that an alternative, undisputed basis exists to reach the same result as the bankruptcy court reached below does not mean the bankruptcy court erred. The existence of an alternative basis for the same relief shows the bankruptcy court unquestionably had authority to sell the painting and that the entire statutory scheme is consistent with the bankruptcy court's rulings. The *Goodman* and *Riverside Nursing Home* cases, *supra*, cited by Smith, confirm that the bankruptcy court has authority to enforce confirmed reorganization plans which are in default such as in Smith's case.

Smith also cites *Hillis* and *Paul*, *supra*. These cases are consistent with the Ninth Circuit Court of Appeals ruling below in allowing the bankruptcy court to exercise its jurisdiction to enforce provisions of a confirmed plan after conversion. Smith's cases at most show alternative grounds for reaching the same result. None of Smith's cited cases bar conversion under a defaulted plan, nor do they bar the exercise of bankruptcy court jurisdiction over the sale of an asset consistent with the terms of a confirmed plan.

Smith defaulted under the Plan. The bankruptcy court converted the case and ordered the painting sold. Smith does

not dispute the bankruptcy court's ultimate authority to do so, but Smith quibbles over meritless, complex legal theories and niceties. His arguments are meritless and unimportant for this Court to address in detail. The Court should deny his Petition.

V.

THE ISSUES SMITH PRESENTS ARE MOOT, AND THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Smith has accepted the benefits of the conversion order. Without the conversion order, the trustee could not have sold the painting. Smith has spent the sale proceeds on attorney's fees, new appeals and on the purchase of another Parrish painting.

One of Smith's cited cases, *In Re: Continental Airlines*, 91 F.3d 553 (3rd Cir. 1996) describes the doctrine of equitable mootness applied in bankruptcy cases such as this as follows:

> . . . Continental invokes the broader interpretation of mootness applied in bankruptcy cases, often referred to as "equitable mootness." Under this widely recognized and accepted doctrine, the courts have held that "an appeal should . . . be dismissed as moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable."

91 F.3d at 558-59 (citations of cases from the First, Second, Fourth, Fifth, Seventh, Ninth, Eleventh and D.C. Circuit Courts of appeals omitted). Equitable mootness refers to the discretionary balancing of equitable and prudential factors rather than the limits of the federal courts' authority under Article III of the Constitution. *Id.* at 560.

The Third Circuit Court of Appeals further explained:

> The factors that have been considered by courts in determining whether it would be equitable or prudential to reach the merits of a bankruptcy appeal include (1) whether the reorganized plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgment.

91 F.3d at 560. Because the case has been converted, the third and fifth factors apply.

Because Sotheby's sold the painting at public auction by court order, the purchaser and all other parties have relied upon the sale. Indeed, the transfer of title to *Daybreak* was never stayed. The outcome of this appeal is not likely to materially affect the remaining administration necessary in this case. The sale proceeds have already been collected, and the remainder must be disbursed and an accounting submitted. The Trustee will be responsible for the accounting regardless of how this Court were to rule on Smith's Petition, even if the Court were to require the exercise of additional equitable powers to reverse all of the transactions undertaken over the past two years in reliance upon the sale of *Daybreak*.

Smith cannot guarantee that all of the transactions can be reversed. The prospect of reversing all such transactions would be impractical at best and highly inequitable. The bankruptcy court correctly converted the case and ordered the sale of *Daybreak*. Smith has accepted and enjoyed the benefits of the sale. His Petition should be denied.

CONCLUSION

John Peter Lee, Ltd. respectfully requests this Honorable Court to enter an order denying Smith's Petition for Writ of Certiorari.

Respectfully submitted,

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